

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   GARY SHERWOOD SMALL,                   :  
4                   Petitioner                   :  
5               v.                   :   No. 03-750  
6   UNITED STATES.                   :  
7   - - - - -X  
8                                   Washington, D.C.  
9                                   Wednesday, November 3, 2004  
10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:01 a.m.  
13   APPEARANCES:  
14   PAUL D. BOAS, ESQ., Pittsburgh, Pennsylvania; on behalf of  
15       the Petitioner.  
16   PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor  
17       General, Department of Justice, Washington, D.C.; on  
18       behalf of the Respondent.  
19  
20  
21  
22  
23  
24  
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. BOAS, ESQ.	
4	On behalf of the Petitioner	3
5	PATRICIA A. MILLETT, ESQ.	
6	On behalf of the Respondent	27
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:01 a.m.)

JUSTICE STEVENS: Mr. Boas, the Court will hear argument in Small against the United States.

ORAL ARGUMENT OF PAUL D. BOAS  
ON BEHALF OF THE PETITIONER

MR. BOAS: Justice Stevens, and may it please the Court:

This case presents the issue of whether, when deciding the meaning of a statute, we will focus, as the Government suggests, on two words only, any court, or whether we will look at the statute as a whole, whether we will consider the statute as a symmetrical and coherent regulatory scheme and decide the meaning of the statute by appreciating how sections relate to one another.

In this particular case, 922(g)(1) of 18 U.S. Code is a -- represents a merger of two old sections, title IV and title VII, that were passed in 1968 in the Omnibus Crime Control Act. In -- in those -- in that statute, we had two redundant and overlapping sections, and one talked about prohibiting persons who have been convicted in any court of a crime punishable by more than a year. One, title VII, talked about prohibiting persons convicted in any court of the United States or a State of a felony. There were different penalties, slightly

1 different classes of people. Title IV focused more on the  
2 receiver; title VII more on the possessor. But nothing --  
3 nothing about the -- these two titles, about the  
4 legislative history suggests that Congress at any time  
5 meant something different from the term, any court, in  
6 title IV and any court of the United States in title VII.

7 And when these two were merged in 1986 in the  
8 Firearms Owners' Protection Act, again, nothing suggests,  
9 nothing in the comments, nothing in the statute, that  
10 these two terms -- that the elimination of the language,  
11 any court of the United States, was --

12 JUSTICE O'CONNOR: Well, I guess we have held,  
13 though, several times that Congress meant to define very  
14 broadly when it enacted felon in possession of firearm  
15 statutes. Did we not?

16 MR. BOAS: That's -- that's correct, Justice  
17 O'Connor. However --

18 JUSTICE O'CONNOR: So it makes it a tougher case  
19 when you use the word any because we've given the -- the  
20 word any generally a broad definition.

21 MR. BOAS: Well, earlier this year in the Nixon  
22 case, this Court said that when we look at any -- and that  
23 was a case dealing with the meaning of any entity. Did it  
24 mean any entity, public or private, or any private entity?  
25 The Court said any can and does mean different things

1 depending upon the setting, and the Court said when using  
2 it broadly would lead to strange and indeterminate  
3 results, we'll give it a more narrow reading, which the  
4 Court did.

5           Now, you're right, Justice O'Connor. This Court  
6 has said that the purpose of the felon in possession  
7 statute was to be broad and sweeping, but the Government  
8 reiterates that view, citing repeatedly three cases,  
9 Scarborough, Bass, and Lewis, and all three of those cases  
10 in which the Court referred to Congress' comments and this  
11 Court's own comments about the broad sweep of the statute  
12 were 1202(a) cases. And so notwithstanding the fact that  
13 the Court said this is a broad statute, each one of those  
14 cases, Lewis, Bass, and Scarborough, were cases where by  
15 definition the prohibition was against persons convicted  
16 in any court of the United States or a State. So that  
17 language doesn't help the Government at all because those  
18 were 1202(a) cases which limited specifically the Court to  
19 any court of the United States.

20           So to take the -- and I -- and -- the simplistic  
21 view that as the -- as the Fourth and Sixth Circuit did  
22 and as the Government does here, that any means any,  
23 without regard to the rest of the statute, is simply -- is  
24 -- is too narrow a focus.

25           Let's look at the statute. It's true that the

1 word -- the term, the two words, any court, is not  
2 defined. But if we look in the definitions section, the  
3 term, crime punishable by more than a year, is defined.  
4 And so what we should really be focusing on is the phrase,  
5 convicted in any court of a crime punishable by more than  
6 a year. And that definition says the term, crime  
7 punishable by more than a year, excludes any State or  
8 Federal antitrust or business regulatory offense.

9 Now, if we exclude from the definition of crime  
10 punishable by more than a year and the Government's -- if  
11 we exclude from that any State or Federal antitrust law  
12 and the Government's interpretation is adopted, then we're  
13 left with the anomalous result that if a person is  
14 convicted of an antitrust offense in this country, they're  
15 allowed to possess a firearm. If they're convicted of one  
16 in France or England, they can't.

17 JUSTICE BREYER: Are there any such cases? I  
18 mean, I never heard actually --

19 MR. BOAS: No.

20 JUSTICE BREYER: -- when people -- no. I mean,  
21 are there any cases in which France or England has  
22 convicted people of an antitrust violation punishable by  
23 imprisonment for more than a year? I -- I didn't know  
24 that their antitrust laws had a criminal aspect, though I  
25 haven't looked it up.

1           MR. BOAS: Nor have I --

2           JUSTICE BREYER: Fine. Well, I -- I've never  
3 heard if anyone in any foreign country, other than ours,  
4 though I gather my law clerk found that in Japan, in fact,  
5 Japan does have a criminal antitrust law. They may be the  
6 only ones outside the United States, and I don't know that  
7 anyone has ever been convicted under it because they're  
8 not too -- or they didn't used to be too fierce on  
9 antitrust enforcement.

10          MR. BOAS: Well, 921(20) or --

11          JUSTICE BREYER: I'm just wondering how  
12 anomalous or your anomaly is.

13          (Laughter.)

14          MR. BOAS: Well, the -- the limitation not only  
15 excludes antitrust offenses, it excludes any business  
16 regulatory offense.

17          JUSTICE BREYER: And are there such?

18          MR. BOAS: Of course. I think --

19          JUSTICE BREYER: I mean, maybe.

20          MR. BOAS: Yes.

21          JUSTICE BREYER: I don't -- I don't -- but I  
22 just -- are we sure that there -- that, you know, that  
23 this anomaly exists?

24          MR. BOAS: I -- I'm certainly that there are  
25 business regulatory crimes throughout the world.

1 JUSTICE SCALIA: Why did they say any State or  
2 Federal? I mean, in -- in a way this provision -- you --  
3 you may say that the -- that the substantive effect of the  
4 provision supports your interpretation, but the text of  
5 the provision supports the Government's --

6 MR. BOAS: Well --

7 JUSTICE SCALIA: -- because if any only means  
8 State or Federal, there was no need to say State or  
9 Federal in this provision. You could have simply said any  
10 in this provision, just as you said it elsewhere. So one  
11 would think that they said State or Federal because they  
12 wanted to exclude foreign antitrust matters.

13 MR. BOAS: Well, this same limitation, Justice  
14 Scalia, existed as a limitation under 1202(a) where any  
15 court said any State or Federal court and the exclusion  
16 said any State or Federal court. It's consistent --

17 JUSTICE SCALIA: Well, I don't care how it got  
18 there. I'm just saying there -- there -- if -- if any  
19 means what you said it means, namely State or Federal,  
20 there would have been no need to limit this other  
21 provision to State or Federal because the whole statute  
22 would only cover State or Federal.

23 MR. BOAS: Well, but at some point in the  
24 statute, Congress has to give an indication of their  
25 intent, and this is where it is.



1           For example, there's another limitation  
2 immediately following it which says it shall also not  
3 include any State offense which is described as a  
4 misdemeanor in the State and carries no more than 2 years.

5           JUSTICE KENNEDY: No. Well, but -- but Justice  
6 Scalia's point -- and I -- I think he's correct -- is that  
7 this cuts at least as much in favor of the Government as  
8 you and probably more because you would make Federal and  
9 State unnecessary surplus.

10           MR. BOAS: Well, there has to be some  
11 indication --

12           JUSTICE KENNEDY: You don't -- you don't set  
13 forth the main qualification to the main definition in a  
14 -- in a later subsection.

15           MR. BOAS: Well, if we go further with 921(20),  
16 there's another limitation that again clearly deals with  
17 States, and that's the restoration of civil rights  
18 provision. The Government concedes in their brief -- and  
19 that was an effort to essentially statutorily reverse the  
20 Dickerson v. Banner Institute case -- that that applies to  
21 State situations. The idea that if a person receives a  
22 State pardon or his record is expunged, that wouldn't be a  
23 disqualifying factor. And they talk about the law of the  
24 foreign state being what determines whether it's a  
25 conviction or not. Now, clearly we're not looking at

1 going to some pardon process in Germany or Uruguay to  
2 decide whether a person still has a conviction.

3 Another part of the statute that's very clear,  
4 924(e)(1). That's the armed career criminal section.  
5 That section says that if a person's who's convicted under  
6 922(g)(1), our statute, and has three prior serious drug  
7 convictions in a court described in 922(g)(1), then they  
8 get 15 years. Now, that definition of serious drug  
9 conviction is a State or Federal conviction.

10 Now, let's flip over to 21 U.S.C. 802(44), the  
11 drug statute where you have a similar recidivist type of  
12 statute where you go from a 5-year mandatory to a 10-year  
13 mandatory if you have a prior drug conviction. There in  
14 802(44), a serious drug offense is defined as a State,  
15 Federal, or foreign drug offense. So we see that Congress  
16 can differentiate when it wants to.

17 Now, they're --

18 JUSTICE GINSBURG: Would -- would you concede  
19 that -- that this is at least sloppy drafting? Because  
20 they said any in one place, they said State or Federal in  
21 other places. Shouldn't they be -- be consistent in their  
22 terminology?

23 MR. BOAS: Well, perhaps they should be more  
24 consistent, Justice Ginsburg, but the overall -- I mean,  
25 if you go down the list of the prohibitions in 922(g)(1),

1   you can see that the thrust of this is -- is to deal with  
2   domestic situations.  There's one that says you can't own  
3   a firearm if you're a -- a fugitive from law -- a fugitive  
4   from justice.  That's specifically defined as a fugitive  
5   from another State within the United States.

6               JUSTICE STEVENS:  Mr. Boas, I think you make a  
7   strong argument that Congress probably didn't think of  
8   this particular problem.  Do you suppose if at the  
9   hearings before the committee, the process of the  
10   legislation, some witness came in and said, do you realize  
11   this language is so broad it will cover the person who is  
12   convicted of a felony in Japan, as well as person who's  
13   convicted of a felony in Illinois, do you think they would  
14   have modified the statute?

15              MR. BOAS:  I think they would have.  I think  
16   that -- I don't concede that there was really a need to,  
17   but I think they would have because they would have said  
18   it's --

19              JUSTICE STEVENS:  Well, there would have been a  
20   need to under your view now.

21              MR. BOAS:  That's right.  But they would have  
22   historically going back to '68 and before, we always  
23   intended this to just cover domestic situations.

24              JUSTICE STEVENS:  But I suppose somebody on the  
25   committee might have said, well, we don't want this kind

1 of person to have a gun, and the fact he's convicted in  
2 Japan rather than in Brooklyn really doesn't make any  
3 difference with regard to the purpose of the statute.

4 MR. BOAS: If the individual is convicted in  
5 Japan, Justice Stevens, then he would not be under our  
6 immigration laws allowed to come to this country, and if  
7 he did come --

8 JUSTICE STEVENS: Well, but this person --

9 MR. BOAS: -- he'd be an illegal alien.

10 JUSTICE STEVENS: But the defendant in this case  
11 was convicted in Japan and he somehow got to the United  
12 States.

13 MR. BOAS: Well, because he's an American  
14 citizen.

15 JUSTICE STEVENS: Well --

16 MR. BOAS: So -- but Congress can't cure every  
17 problem that exists in the world, and this statute is  
18 fairly comprehensive.

19 JUSTICE BREYER: Are people really not allowed  
20 to come in if they've been convicted of any crime?

21 MR. BOAS: Any crime that carries more than a  
22 year basically. It's pretty --

23 JUSTICE BREYER: Suppose it was a crime like not  
24 wearing a veil if you're a woman in a country that --  
25 suppose it was a crime like criticizing the government if

1     you were in Soviet Russia. Suppose it was a crime like --  
2     you know, there are all kinds of crimes that we -- we  
3     would never consider crimes --

4             MR. BOAS: Well, that's --

5             JUSTICE BREYER: -- and in other countries there  
6     are -- we don't let anyone in if they've done any of those  
7     things?

8             MR. BOAS: No. Well, those people will probably  
9     be seeking political asylum. Aleksandr Solzhenitsyn --  
10    under the Government's interpretation, Nobel Prize winners  
11    would be precluded from -- Solzhenitsyn did 8 years in a  
12    Soviet prison because he said nasty things about Joseph  
13    Stalin. Two American women in Afghanistan, before the  
14    fall of the Taliban regime, were arrested and convicted  
15    because they possessed Bibles. Now, the Government says,  
16    well, these are anomalies. These don't occur often. But  
17    Congress had to be aware of the possibility of tinhorn  
18    dictatorships all over the world having court systems that  
19    were so devoid of due process that we have to take a look  
20    at whether we want to --

21            JUSTICE GINSBURG: Well, the -- the court of  
22    appeals here said what it would -- it read in a check. It  
23    said it wouldn't read it to really mean any conviction.  
24    It had to be in a system that was fundamentally fair.  
25    Wasn't that what the court of appeals said?

1           MR. BOAS: That's what they said, but -- but  
2 when and how do we decide that? There's another offense  
3 under 922(g)(1) -- or under 922 that makes it a crime to  
4 give a false answer on a -- a firearms questionnaire when  
5 you go to buy the gun -- buy the gun. Now, what does not  
6 individual do? Does he say to the firearms dealer, do you  
7 have a list of countries where our Government has decided  
8 it's a fair enough system that I can say no -- yes, I have  
9 a conviction in view of the list that it's an unfair  
10 system so I can say yes, I have no -- or no, I have no  
11 convictions?

12           I mean, it -- one of the reasons where we  
13 employ, for example, the rule of lenity, is -- is a person  
14 put on notice of what it is that's criminal and what is  
15 not. When does it come up that the system isn't fair  
16 enough to count?

17           JUSTICE SCALIA: Well, I think -- let -- let's  
18 put, you know, the worst for you. If it were put to  
19 Congress, which would you prefer, that -- that  
20 Solzhenitsyn not be able to have a gun or that the worst  
21 kind of violent criminal convicted and imprisoned and  
22 escaped from a foreign country who manages to get into  
23 this country can go in and buy a gun? Which -- which of  
24 these two would you prefer? And I think I'd say, well,  
25 you know, it's tough on Solzhenitsyn he can't own a gun,

1 but he'll probably get over it.

2 (Laughter.)

3 MR. BOAS: Well, what I'd prefer and that the  
4 statute means aren't necessarily the same thing, Your  
5 Honor. I'd prefer violent criminals who were dangerous  
6 not to have guns. But again, that --

7 JUSTICE BREYER: Suppose you put the question to  
8 Congress, which would you prefer? Would you prefer the  
9 occasional person who's been convicted of foreign court,  
10 comes over here, that this statute doesn't apply to him,  
11 or would you prefer that all the refugees from Eastern  
12 Europe and people who come from Arab countries and people  
13 who come from countries that have quite different systems  
14 in places all over the world discover that suddenly  
15 they're felons because of things they never would have  
16 dreamt of because they were perhaps convicted of selling  
17 gasoline on the open market or perhaps they were convicted  
18 of any of these religious crimes we've talked about,  
19 selling a Bible? Suppose you put that question to  
20 Congress.

21 MR. BOAS: I think Congress would say the perils  
22 and problems that exist by a blanket inclusion without any  
23 method of determining which count and which don't count of  
24 foreign convictions are too great. Now --

25 JUSTICE KENNEDY: Well, if it's a -- if it's a

1 matter of notice and -- then that's a separate issue.  
2 Plus the Government, it seems to me, should put on its  
3 form that this includes foreign conviction, and that  
4 solves that problem.

5 MR. BOAS: Well, but what if it's a foreign  
6 conviction where there's no due process? Is there a  
7 checklist that in that foreign conviction, did you have a  
8 jury, did you have the right to confront your accuser, did  
9 you have the right to remain silent? I mean, we all seem  
10 to realize that the Government's position that any  
11 conviction anywhere is too stark a place. And again --

12 JUSTICE GINSBURG: May -- may we go back to the  
13 -- the choice that you were given by Justice Scalia first  
14 and then Justice Breyer? I thought that someone who comes  
15 in here illegally and possesses a gun commits an offense.

16 MR. BOAS: That's right.

17 JUSTICE GINSBURG: Isn't it so? So there's not  
18 -- Congress would say to that hypothetical, we've got a  
19 third choice, much more sensible. Anybody who sneaks in  
20 here without permission and has a gun --

21 MR. BOAS: That's correct.

22 JUSTICE GINSBURG: -- commits a crime.

23 MR. BOAS: That's one of the subsections of  
24 922(g)(5). Anybody who's an illegal alien here illegally  
25 can't have a gun. Anyone --



1 JUSTICE SCALIA: So it doesn't cover Americans,  
2 of course --

3 MR. BOAS: No. It doesn't cover --

4 JUSTICE SCALIA: -- who go -- go and commit  
5 crimes abroad, are convicted abroad, and -- and come back  
6 to home sweet home and then get a gun. I mean, that seems  
7 to me extraordinary.

8 MR. BOAS: That -- I didn't hear your --

9 JUSTICE SCALIA: That seems to me extraordinary.  
10 I don't think Congress would have wanted that.

11 MR. BOAS: Well, I don't think Congress can be  
12 said to have intended or envisioned that they would cure  
13 every problem in the world. It's a very, very narrow  
14 category of American citizens convicted abroad who come  
15 back here.

16 JUSTICE SCALIA: I think if there was a problem  
17 that -- that they were going to leave unsolved, it is less  
18 likely the problem of having an American citizen killed by  
19 a gun toted by somebody who has been convicted of a crime  
20 abroad than it is the problem of somebody having been  
21 convicted abroad of some silly crime like wearing a veil  
22 or not wearing a veil or something else. If -- if it's  
23 either of those two problems that they meant to leave  
24 overlooked, I would say it's the latter. They might well  
25 have said, well, the courts will take care of that.

1           MR. BOAS: Well, Your Honor, it's unclear what  
2 -- what their thought process was in this matter. But I  
3 can say this, that the narrow category that escapes the  
4 coverage of this statute -- there's nothing to indicate  
5 anywhere in any of the debates, in the language of the  
6 statute that that's what Congress intended.

7           And again, if you look at the overall view here,  
8 I mean, fugitive from justice. It's limited to someone  
9 from the State. Person -- let's look at 922(g)(9). Very  
10 clear, incapable of misunderstanding. The same prefatory  
11 language. A person convicted in any court -- exactly the  
12 same, and it ends with the same language -- cannot ship,  
13 possess, receive. And what does it say? Instead of  
14 saying convicted of a crime punishable by more than a  
15 year, it says convicted of a misdemeanor crime of domestic  
16 violence. And that's defined as a State or Federal  
17 misdemeanor.

18           JUSTICE SCALIA: Where -- where is that defined?

19           MR. BOAS: That's defined in 921(a)(33), Your  
20 Honor. It's specifically limited.

21           Now, here we are. A person who beats his wife  
22 in England can have a gun in this country, but a person  
23 who commits a business regulatory offense in Germany  
24 can't. It makes no sense. The -- it -- it's a very clear  
25 statement by Congress that a misdemeanor crime of domestic

1 violence -- they're only intending it to be a State or  
2 Federal crime.

3 JUSTICE SCALIA: Once again, that -- that cuts  
4 both ways. Why would they -- if the text reads the way  
5 you say it reads, why did they have to say is a  
6 misdemeanor under Federal or State law? Because it  
7 wouldn't have mattered. The only courts -- the only  
8 convictions that would be covered would be Federal or  
9 State convictions. They would not need that -- that  
10 qualification.

11 MR. BOAS: At -- at some point a person has to  
12 be told what Congress was intending. This language goes  
13 back to '68 where the language in the exclusion limiting  
14 it to State -- excluding Federal and State convictions  
15 matched the language in the term, any court, in 1202(a),  
16 which was title VII. They were -- they were complementing  
17 each other.

18 And -- and if you look at even as far back as  
19 the Batchelder decision in the '70's from this Court, the  
20 Court talked about these two being redundant, overlapping,  
21 the only difference being that one uses the term felony,  
22 one uses the term crime punishable by more than a year.

23 JUSTICE GINSBURG: Mr. Boas, when they combined  
24 these two --

25 MR. BOAS: Yes.

1 JUSTICE GINSBURG: -- and ones -- the 1202 did  
2 say Federal or State -- they made other changes,  
3 harmonizations. In the explanation of their consolidation  
4 of the two sections, to what extent did they discuss  
5 changes and the reasons for them?

6 MR. BOAS: The -- they made no discussion of the  
7 reason for taking out the language, of the United States  
8 or of any State, and what they -- the only language was  
9 that we're intending to merge these into one statute --

10 JUSTICE GINSBURG: But they did -- they did  
11 explain other things --

12 MR. BOAS: Yes.

13 JUSTICE GINSBURG: -- other changes, but this  
14 one -- there's silence --

15 MR. BOAS: Exactly.

16 JUSTICE GINSBURG: -- as far as I understand.

17 MR. BOAS: And -- and by keeping in the  
18 exclusions, by -- by looking at 924(e)(1) where it --  
19 what's very important to me is that 924(e)(1) says if you  
20 have three prior drug -- serious drug offenses in a court  
21 referred to in 922(g)(1), you get 15 years. Those three  
22 prior three drug offenses in a court referred to in  
23 922(g)(1) are State or Federal drug offenses by  
24 definition. It seems to me that it really couldn't be any  
25 more clear.

1           And frankly, to the extent it's not totally  
2 clear and it could go either way, I think then the rule of  
3 lenity requires that it be decided with a more narrow  
4 construction, that is, that any court meant any court of  
5 the State or of the United States.

6           I believe it was in the -- in the '90's when  
7 this Court's opinion, authored by Justice Thomas in I  
8 think it was called Alvarez-Sanchez, dealt with a statute,  
9 3105 dealing with the admissibility of confessions in  
10 Federal cases and that they won't be inadmissible if  
11 they're taken by any law enforcement official more than 6  
12 hours after the arrest. And the issue what does any mean  
13 in terms of any law enforcement official. And the Court  
14 said it means any State or Federal law enforcement  
15 official. Now, it didn't have to reach the issue of  
16 whether it included foreign law enforcement officials, but  
17 certain things are obvious without an -- an explanation.

18           And you're right. There was some sloppy  
19 drafting here and it could have been more clear, but when  
20 we look at the statute as a whole and try to harmonize the  
21 various parts of that statute, it would be almost absurd  
22 to think, when we look -- and -- and maybe these anomalies  
23 won't occur all the time, as you point out, Justice  
24 Breyer, but it would almost be absurd to think that with  
25 all of these limitations, exclusions, when we run down the

1 list under 922(g)(1), that Congress was talking about any  
2 court in the world. Now --

3 JUSTICE SCALIA: Let me -- let me ask you the  
4 question the -- the Chief Justice would ask, were he here,  
5 because he always asked this kind of a question. What --  
6 if you had to pick your best case of ours which  
7 interpreted the word any in the way that you would like us  
8 to interpret here, what's -- what's the best case you  
9 have?

10 MR. BOAS: I'd say -- that's -- there's a  
11 question --

12 JUSTICE SCALIA: It's a good question. Yes,  
13 it's a good question.

14 MR. BOAS: It's a good question.

15 (Laughter.)

16 MR. BOAS: I'd say the Nixon case decided this  
17 year which said that any can and does mean different  
18 things depending upon the setting and whether it works  
19 strange and indeterminate results would be one of my best  
20 cases. There's -- when I sit down, I'll probably think of  
21 a better one, but --

22 JUSTICE STEVENS: Maybe you can think --

23 JUSTICE GINSBURG: How -- how about --

24 JUSTICE STEVENS: Maybe you can think of a  
25 unanimous case.

1 MR. BOAS: Well --

2 (Laughter.)

3 JUSTICE GINSBURG: And this is one I'm -- I'm  
4 surprised that you didn't cite, but it -- I don't think  
5 you did -- EEOC against Arabian American Oil Company,  
6 where the wording of the statute was anyplace outside the  
7 United States, title VII coverage, and this Court held  
8 that anyplace outside the United States did not mean that  
9 a U.S. employer operating abroad had to abide by the anti-  
10 discrimination norms with respect to hiring in some place  
11 abroad because Congress was thinking in terms of the  
12 inter-State sitting -- in the setting and not  
13 international.

14 MR. BOAS: Well, I -- I'm not familiar with that  
15 case.

16 JUSTICE GINSBURG: That -- that was a decision  
17 by the Chief. So --

18 (Laughter.)

19 MR. BOAS: That's should be -- that's a good one  
20 too, Judge -- Justice.

21 I -- I -- there's -- there's another case that  
22 I'd refer to which is the -- the Gonzales case, which is  
23 cited by the Government. Gonzales is interesting because  
24 it deals with 924(c)(1), which is the section that says  
25 you get 5 consecutive years if you're convicted of -- 5

1 years consecutive to any other sentence if you're  
2 convicted of possessing a firearm during the course of a  
3 serious drug offense. And in that case, the Court  
4 concluded that any other sentence meant any State or  
5 Federal sentence, not just a Federal sentence.

6 Now, the Government might argue that that helps  
7 them because the -- the defendant in that case wanted it  
8 to be limited to any Federal sentence because he was  
9 serving a State sentence, and the question was would the 5  
10 years for the 924 violation be consecutive or concurrent,  
11 as the trial court gave it.

12 But it -- what the Court did was say any depends  
13 on the context of the rest of the statute. And here, we  
14 think it means State and Federal. They didn't talk about  
15 foreign convictions.

16 You know, it's interesting. It's ironic that --  
17 that while we're debating how American citizens should be  
18 impacted by foreign convictions, the administration is  
19 unwilling to sign the treaty that would make American  
20 citizens subject to the International Criminal Court  
21 because there's concern about what would happen to  
22 Americans abroad, even in that court, not in a court in --  
23 in Uruguay or in North Korea, but in the International  
24 Criminal Court.

25 In fact, in the preliminary findings of the FOPA



1 statute, the -- the Congress said -- and this Court  
2 doesn't have to decide and I'm not asking the Court to  
3 decide the Second Amendment issue, but Congress found the  
4 Second Amendment was a fundamental constitutional right.  
5 And the name of the statute is the Firearms Owners'  
6 Protection Act. Congress had in mind protecting the  
7 owners of firearms when necessary, and --

8 JUSTICE SCALIA: You call that FOIPA? That's the  
9 name of the statute?

10 (Laughter.)

11 JUSTICE SCALIA: It's an unfortunate acronym,  
12 isn't it?

13 (Laughter.)

14 MR. BOAS: That's right. The spelling is a  
15 little bit different, Justice Scalia.

16 But Congress -- the -- the name of the statute  
17 tells you something about Congress' intent. The otherwise  
18 licit and blameless activity of possessing a firearm isn't  
19 the equivalent of selling drugs. Now, maybe if you have a  
20 prior drug offense and you're a drug dealer, under 802 of  
21 21, Congress said you get your sentence doubled whether  
22 it's a State, Federal, or foreign conviction, but under  
23 924(e) for a conviction under a court defined in  
24 922(g)(1), the prior only ups your sentence if it's a  
25 State or Federal conviction. We can't ignore the overall

1 statutory scheme here, which time and time again refers to  
2 domestic matters.

3           The Government in their brief says foreign  
4 convictions are used all the time, and they give three  
5 examples. They say we recognize them for the purpose of  
6 extraditing American citizens. They say we recognize them  
7 because if you're convicted of a -- a sex offense in  
8 certain foreign countries, you have to register here. And  
9 they say we recognize them -- I forget what their third  
10 reason is. But there's no example that they gave or that  
11 they can give where a foreign conviction is ever used  
12 anywhere else in this country as an element of the crime.  
13 I mean, it's used for recidivist purposes and State courts  
14 have debated back and forth whether we're going to double  
15 somebody's sentence because of a foreign conviction, but  
16 it's never used anywhere else as an element of the crime.  
17 This -- this would be a first, and it's pretty  
18 significant.

19           To me it's ironic that the Sentencing Commission  
20 said you can't use a foreign conviction simply to up  
21 somebody a few months in the guidelines. But the  
22 Government here argues that we can use it to satisfy an  
23 element of the crime --

24           JUSTICE SCALIA: Recidivism is an element of the  
25 crime. If -- if you have a crime of, you know, repeated

1 felony, recidivism is an element.

2 MR. BOAS: Well, that -- that's correct, Your  
3 Honor. Of course, the -- it's an exception under Appendi  
4 that the -- the prior crime. But what -- what I'm saying  
5 is it's -- it's a slightly different situation in terms of  
6 it being -- I know we have Blakely and the whole  
7 sentencing factor issue. But it -- it's a slightly  
8 different use of a prior and making -- in other -- in all  
9 those cases, the -- it's a crime whether or not you have a  
10 felony. The felony might make it a more serious crime.

11 In our case, this isn't a crime without this  
12 felony. That's the thing that makes it a crime. And what  
13 I'm saying is the only situation we have where something  
14 that's otherwise blameless conduct becomes a crime is the  
15 use of a felony. There's no other situation where a  
16 foreign felony is employed or has been employed in that  
17 situation.

18 If there's no other questions, I'd like to, if  
19 it would please the Court, reserve the --

20 JUSTICE STEVENS: I'm sorry. You've exhausted  
21 your time.

22 MR. BOAS: I have. Well, thank you.

23 JUSTICE STEVENS: Ms. Millett.

24 ORAL ARGUMENT OF PATRICIA A. MILLETT

25 ON BEHALF OF THE RESPONDENT

1                   MS. MILLETT: Justice Stevens, and may it please  
2 the Court:

3                   Justice Scalia, you asked about what case we  
4 would want to adopt and be our strongest case on the  
5 meaning of the word any in the statute, and my answer to  
6 that question, although I take the liberty of answering  
7 it, though you didn't ask me --

8                   JUSTICE SCALIA: You can ask it as well --

9                   (Laughter.)

10                  MS. MILLETT: -- is the Gonzales case where this  
11 Court said that the word any in the gun control law, in  
12 this context, in this framework means, read naturally --  
13 I'm quoting here. Read naturally, the word any has an  
14 expansive meaning, that is, one or some indiscriminately  
15 of whatever kind.

16                  This is not, Justice Ginsburg, a statute where  
17 Congress wrote sloppily. In fact, in Barrett and  
18 Huddleston, this Court specifically said and noted that  
19 excruciating care with which Congress wrote title IV,  
20 section --

21                  JUSTICE STEVENS: Yes, but --

22                  JUSTICE GINSBURG: There is -- there's an  
23 overarching concern and I'll -- I'd like to put it to you  
24 right from the beginning. When a legislature legislates,  
25 be it the State or Federal Government, it is generally



1 MS. MILLETT: That's no more --

2 JUSTICE STEVENS: -- but let me just interrupt

3 on your -- your best case suggestion. I don't think the

4 test is when has the word any been used in different ways,

5 but has the word any court ever been used by Congress to

6 include foreign courts.

7 MS. MILLETT: The -- the phrase convicted in any

8 court --

9 JUSTICE STEVENS: No. I'm asking about just the

10 words, any court. What's your best case for the

11 proposition that that would normally be construed by

12 Congress to include foreign courts?

13 MS. MILLETT: I don't -- I don't have a case

14 that specifically talks about --

15 JUSTICE STEVENS: You don't have a case.

16 MS. MILLETT: -- that yet, but if I can -- if I

17 can explain why the phrase convicted in any court --

18 because any any court -- the -- the problem is you're not

19 -- there's not a case for that. The word, any court, that

20 -- those two words appear in a lot of places in the United

21 States Code.

22 JUSTICE STEVENS: And do they ever refer to

23 foreign courts? That's the question.

24 MS. MILLETT: The -- not -- not that I'm aware

25 of, but -- but they don't -- it -- it doesn't address it

1 one way or the other. Most of the times, the vast  
2 majority of the times that you see any court in the United  
3 States, it -- in the United States Code, it's followed by  
4 qualifying terms.

5 What's very important here is that the phrase  
6 convicted in any court without qualifications. There's  
7 lots of any courts in the United States --

8 JUSTICE STEVENS: But the reason you often need  
9 qualification is there's -- there's sort of basic  
10 question, does this include State courts as where as -- as  
11 well as Federal, and it's often necessary to spell it out  
12 one way or the other. But I don't -- I'm not aware of any  
13 precedent for trying to decide whether it also embraces  
14 foreign courts.

15 MS. MILLETT: Justice Stevens, if I could make  
16 two points. Again, convicted in any court is rarely  
17 employed by Congress. Rarely. And we've cited in our  
18 brief on the occasions it has been employed, the context  
19 and structure are wholly consistent with including foreign  
20 judgments. The PATRIOT Act created a ban on the  
21 possession of biological agents or toxins, and it -- it  
22 picked up this same phrase and put it in there, and I  
23 think it is -- would -- and that is also a statute that in  
24 a separate provision has extraterritorial application.

25 JUSTICE BREYER: How many times have you used

1 this statute to go after people who were convicted in a  
2 foreign court?

3 MS. MILLETT: It -- it's -- I can't give you an  
4 exact number because we --

5 JUSTICE BREYER: About, approximate.

6 MS. MILLETT: -- we don't know about the ones  
7 that we never hear about.

8 JUSTICE BREYER: More like 100, more like 50,  
9 more like 10, more like 5? About how many?

10 MS. MILLETT: It's -- it's not that -- I would  
11 -- I would say there's probably 10 to a dozen, but I -- I  
12 have to --

13 JUSTICE BREYER: 10 to a dozen over how long a  
14 period of time? 20 years, 18 years?

15 MS. MILLETT: Since 1968. It's been on the  
16 books since 1968.

17 JUSTICE BREYER: '68. Now -- so 35-40 years.

18 Now -- now, how many times do you think that  
19 people -- I mean, the -- the -- if you've used it only a  
20 dozen times or so in about 40 years, then it doesn't sound  
21 like a major threat. What I'm weighing against that is  
22 the possibility that people are really convicted abroad of  
23 selling Bibles. That really does happen, and there really  
24 were economic crimes in 1968 in all the Eastern European  
25 countries, and these aren't fanciful examples I've been



1 giving you.

2 And so if you were in Congress -- or -- or why  
3 do you think that Congress would have wanted to get the  
4 courts into the mess of trying to decide why wouldn't  
5 those crimes be covered and were the procedures fair? And  
6 we start distinguishing one country from another. And  
7 what are the procedures in the Ukraine or Kazakhstan  
8 anyway? I mean, my goodness, what a mess for the sake of  
9 a dozen cases in 40 years.

10 MS. MILLETT: Justice Breyer -- and Justice  
11 Stevens, I do want to get back because I do have a lower  
12 court case that interprets any court in the way you  
13 discussed. I want to get back to that.

14 But Justice Breyer, I understand this being a  
15 very important concern, and -- and there are no doubt  
16 particular applications that could seem unappealing, just  
17 as in *Lewis v. United States* where this Court held that an  
18 invalid, a patently unconstitutional State conviction  
19 counts for section 922(g)(1). The reason that the -- the  
20 convictions are covered here is Congress was not --

21 JUSTICE GINSBURG: Which was it? Just -- what  
22 was the case you just mentioned?

23 MS. MILLETT: *Lewis v. United States*, and that  
24 is -- that's really our favorite case, although we like  
25 the word of -- definition *Gonzales* has for any. But in

1 Lewis v. United States, this Court addressed the question  
2 whether the ban on possession of firearms by someone  
3 convicted of, I'll say, a felony, a term of imprisonment  
4 of more than 1 year, applies to -- to convictions that are  
5 allegedly unconstitutional under State law or may, in  
6 fact, be unconstitutionally entered. They could have been  
7 the product of a coerced confession. The allegation there  
8 was lack of representation of counsel.

9 JUSTICE GINSBURG: Well, that -- that example,  
10 what you gave in your brief, gave me this concern. The  
11 problem that you've just been describing, the State  
12 convictions that may be invalid but is being used under  
13 922, I regard that as a kind of a venue question because  
14 you can go back to the State that rendered the conviction  
15 and say, State, I was convicted in violation of the  
16 Constitution, give me my good habeas writ that I get --  
17 can get from the State. Then I wipe out that conviction  
18 and I don't have it anymore.

19 But the person who's been convicted, say, in  
20 whatever examples -- take -- Zimbabwe would be another  
21 example. Libya. To go back to that system and get a  
22 conviction expunged. That's why you can't use a case  
23 within the U.S. system where it's a question of where do  
24 you go to wipe out your prior conviction. And for someone  
25 abroad, there isn't that option.

1 MS. MILLETT: Justice Ginsburg, in Daniels v.  
2 United States, which dealt with 924, the sentencing  
3 enhancement provision, but it has a -- the parallel and  
4 incorporates 922(g)(1) convictions, this Court held -- a  
5 plurality of this Court held in five opinions that -- in  
6 fact, that the -- the bar -- or that you still count an  
7 unconstitutional or allegedly unconstitutional State  
8 conviction, even if it was never appealed and that -- and  
9 there is no more opportunity for appeal. The time has  
10 passed. And under 922(g)(1), we also count.

11 JUSTICE GINSBURG: But that's -- that's a  
12 question of waiver or forfeiture. Those are the ordinary  
13 rules that apply.

14 MS. MILLETT: Yes, but that --

15 JUSTICE GINSBURG: But -- but there's a basic  
16 rule in civil as well as criminal procedure, that if you  
17 want to attack a judgment, you go where that judgment was  
18 rendered. And of course, you should abide by the timing  
19 rules of that, but that's just a very sensible thing  
20 within a federal union. If you're -- if you're attacking  
21 what State A does, go to State A, don't tell State C.

22 MS. MILLETT: And --

23 JUSTICE GINSBURG: But that -- that doesn't  
24 operate internationally.

25 MS. MILLETT: Well, it does certainly in this

1 case. He could have appealed his conviction in Japan and  
2 he did not. So he had a forum to do that in. But --

3 JUSTICE GINSBURG: Yes, but you're not building  
4 that into your interpretation of the statute at all  
5 because you have said in your brief -- and correct me if  
6 I've got you wrong -- you don't like what the Third  
7 Circuit did. You say just the fact of the conviction  
8 counts. Don't investigate, court, whether it was a fair  
9 system that comports with fundamental notions of due  
10 process. Just see if there's a conviction anyplace in the  
11 world. And so what -- what you're telling me is that it  
12 doesn't matter that you didn't appeal because even if he  
13 were precluded from appealing for some reason that we  
14 would consider totally unfair, it doesn't matter on your  
15 view of this statute.

16 MS. MILLETT: That -- that's right, Justice  
17 Ginsburg, and that is -- you know, the -- the statute also  
18 bars receipt of firearms by anyone who's under indictment.  
19 And that application applies even though you can't appeal,  
20 except for exceptional circumstances. You can't appeal an  
21 indictment. And the 922(g)(1) bar, this Court's decision  
22 in Lewis made clear, is that it still applies unless and  
23 until your conviction is overturned. So you don't have to  
24 have had a -- a conviction vetted through the appellate  
25 process before the bar attaches.

1                   In -- in the immigration context --

2                   JUSTICE GINSBURG: But that's -- that's standard  
3 for judgments anyway. When the judgment is final, it  
4 means you've gotten through the first -- it has preclusive  
5 effect. Almost always, when a judgment is overturned on  
6 appeal, then you go back to State 2 and say, look, it's  
7 been overturned on appeal, and at least in the civil side,  
8 almost always State 2 will say, okay, we'll give you post-  
9 judgment relief because what we were relying on as our  
10 sister State judgment is no longer on the books. I can't  
11 imagine that in our criminal system it doesn't work the  
12 same way.

13                  MS. MILLETT: Well, certainly in immigration and  
14 extradition, you don't get to appeal the validity of your  
15 foreign conviction or the -- the processes that led to it.  
16 So this is not an alien concept.

17                  And it's very important to understand what  
18 Congress was doing here. This isn't --

19                  JUSTICE GINSBURG: I'm asking if it's alien in  
20 our criminal justice system, not in deportation, not in --  
21 extradition is somebody who did somebody -- something  
22 abroad, and we don't send people just to anyplace. Don't  
23 we have to have a treaty?

24                  MS. MILLETT: Right. We have treaties with more  
25 than 100 countries and we don't -- and -- and the courts

1 do not examine the fairness of the proceedings or --

2 JUSTICE GINSBURG: Because the person is going  
3 to be tried in that other system, and we have bound --  
4 within our international system, we say we're part of a  
5 world community and we want Japan to extradite people who  
6 have done bad things here to the United States, and so  
7 similarly, we will extradite to Japan. We don't want them  
8 to look at our system and judge it. We're sending  
9 somebody to be tried there. So extradition is -- is  
10 something entirely different than --

11 MS. MILLETT: Although we -- we do also  
12 extradite, just to serve sentences, where there may have  
13 already been a trial that could be as flawed as anyone  
14 could conceive or articulate. So --

15 JUSTICE GINSBURG: Well, we have the check  
16 already that these are -- these places with whom we want  
17 to do criminal justice business together. So --

18 MS. MILLETT: Well, what we have is the check  
19 that the political branches have decided that it's  
20 important to attach significance to foreign court --

21 JUSTICE GINSBURG: And then we have the -- we  
22 have the document where it's very clear we want to have  
23 extradition with the UK, with Japan. Here, you're relying  
24 on the word court, and you don't have it all spelled out  
25 like you do in an extradition treaty. And that's the

1 problem here. Sure, if Congress had said we mean foreign  
2 court, then that would be it, but it hasn't said that and  
3 we have to determine does it mean the same thing as it  
4 means in the extradition context or the deportation  
5 context where you have a clear statement that Congress  
6 means a tribunal abroad.

7 MS. MILLETT: In fact, in 8 U.S.C. 1182(a) which  
8 -- which -- inadmissibility criterion for aliens,  
9 convictions of moral turpitude, there's no reference to  
10 whether it's a conviction by a foreign court or a domestic  
11 court.

12 JUSTICE GINSBURG: But if somebody is coming  
13 into the country, somebody is asking to come in, any  
14 conviction that you're talking about, of course, refers to  
15 someplace abroad.

16 MS. MILLETT: No. No, it doesn't, Justice  
17 Ginsburg, because frequently and throughout that same  
18 statute, it refers to convictions in the United States. A  
19 lot of times the reason for inadmissibility, including the  
20 Mariel Cubans cases this Court heard last month, is -- is  
21 convictions committed in the United States.

22 JUSTICE STEVENS: May -- may I interrupt this --

23 MS. MILLETT: Now, surely the context --

24 JUSTICE STEVENS: -- this colloquy to raise  
25 another question, if I may? Would you concede that there

1 are some tribunals in the world that are comparable to  
2 what you might call a kangaroo court that Congress would  
3 not have intended to include within the term court?

4 MS. MILLETT: Yes, Justice Stevens. And I think  
5 that's an important thing here. There has been no  
6 contest, for obvious reasons -- we're dealing with Japan  
7 -- as to what Congress meant by court. And sometimes if  
8 it's Saddam Hussein's --

9 JUSTICE STEVENS: And how are we to decide  
10 whether such tribunal should be treated as a court within  
11 the meaning of the statute when there is no statutory  
12 definition of the term court?

13 MS. MILLETT: Through traditional rules of  
14 statutory construction. I think that would involve  
15 looking at the other -- the -- the background that  
16 Congress would have enacted the statute against, first of  
17 all, and that -- that may well have -- it may not have  
18 been courts of just the United States because, as we know,  
19 Congress twice deleted that limitation from the statute.

20 JUSTICE STEVENS: But if you concede that there  
21 are some tribunals that are not courts within the meaning  
22 of the statute, are you not conceding that the word court  
23 is inherently ambiguous?

24 MS. MILLETT: I -- I am -- I am conceding that  
25 -- that it has to be given meaning. I don't know that I



1 would call it ambiguous, is we have to figure out. But I  
2 -- what I will say is that the phrase --

3 JUSTICE STEVENS: But it's something less than  
4 the all-inclusive term, any court, in a literal sense.

5 MS. MILLETT: Any -- it has to be -- it has to  
6 be a court capable of entering convictions. I don't -- I  
7 don't think it's ambiguous in a sense --

8 JUSTICE KENNEDY: Well, I mean, it doesn't --  
9 it's -- it's not a tennis court or an inner court.

10 (Laughter.)

11 MS. MILLETT: Right.

12 JUSTICE KENNEDY: If -- if somebody asked where  
13 this man was convicted, they'd say in a Japanese court.

14 MS. MILLETT: Right. And -- and I think, in  
15 addition, we don't decide that a word is ambiguous just at  
16 looking at that word. We would look at the overall  
17 structure of the statute, and we would decide that it has  
18 to be a governmental entity capable of entering  
19 convictions.

20 JUSTICE BREYER: You didn't really have a  
21 chance --

22 JUSTICE SCALIA: Can I assume that there's some  
23 prosecutorial discretion in the application of this  
24 statute? I mean, have you --

25 MS. MILLETT: Absolutely, Justice --

1 JUSTICE SCALIA: -- have you prosecuted any --  
2 any woman who tried to buy a firearm because she had been  
3 convicted of wearing -- not -- not wearing a veil?

4 MS. MILLETT: No, Justice Scalia.

5 JUSTICE SCALIA: Do you think any United States  
6 attorney would do that?

7 MS. MILLETT: I would hope not, Justice Scalia.  
8 I think --

9 JUSTICE SCALIA: Or -- or somebody who was  
10 convicted of treason in Cuba? You -- you think that --  
11 that that would be a -- a case that would be prosecuted  
12 vigorously by a United States attorney?

13 MS. MILLETT: I -- I wouldn't think so. I  
14 think --

15 JUSTICE STEVENS: Do you know any cases in which  
16 we've construed a statute narrowly on the ground that  
17 we're confident the prosecutor won't bring any such cases?

18 MS. MILLETT: That -- well, again, just last --  
19 this isn't -- this isn't quite the same context. But just  
20 this -- just last term in the Cheney case, this Court  
21 recognized the limitations on prosecutors.

22 And in *Atwater v. City of Lago Vista*, in  
23 determining the scope of the Fourth Amendment and the  
24 capacity to arrest for misdemeanors, this Court recognized  
25 that not all checks have to come from the courts. They

1 can come from the political process here.

2 And it's very important to keep in mind that  
3 these hypothesized problems, bad applications, are that.  
4 Purely hypothesized. This has been on the books for  
5 almost 40 years.

6 JUSTICE STEVENS: But it's -- it's been on the  
7 books for so long with very, very few prosecutions. So  
8 it's one -- it's not exactly an urgent question. But it  
9 does seem to me if this -- this problem had been brought  
10 to the attention of Congress, they would have defined the  
11 term court, and I don't -- they haven't done that but  
12 probably because they didn't think of the problem. And  
13 you can argue, well, they surely would have wanted to have  
14 this particular person prosecuted, but would they have  
15 wanted everyone with every foreign court all over the  
16 world. That's the question.

17 MS. MILLETT: And in Beecham v. United States,  
18 in Justice O'Connor's opinion for the Court, this Court  
19 recognized there -- it was dealing with another issue,  
20 whether the jurisdiction that restores civil rights is  
21 different from the convicting jurisdiction. It said we  
22 don't have any way of knowing whether Congress thought  
23 about that. That's not the question.

24 Congress passed a statute here. It passed a  
25 statute that's been written very carefully. It's passed a

1 statute where the definition of the word any in the  
2 statute has already been defined. And the -- what the  
3 statute has been used for is to prosecute exactly the  
4 people that Congress wanted to capture. It's  
5 international gun smugglers --

6 JUSTICE GINSBURG: Ms. --

7 MS. MILLETT: -- violent assailants --

8 JUSTICE SOUTER: Well, Ms. -- Ms. Millett, my --  
9 my problem with that argument and I guess my basic problem  
10 with -- with the case is Congress did not just sort of  
11 stop when it got to the point that would support your  
12 Lewis argument. It went a step -- it went several steps  
13 further. But one of the steps further that it went to was  
14 -- was in -- in a certain fussiness about the definition  
15 of crime, and it said, well, we want to make sure that --  
16 that no State or -- or Federal business criminals are --  
17 are put at a disadvantage by this. It then accepted  
18 anything that a State might call a misdemeanor if it  
19 carried no more than 2 years. And it just seems very odd  
20 to me that Congress would have been that careful in  
21 putting these limitations on State and Federal crimes and  
22 would totally have ignored any category of crime under  
23 foreign law, any conviction under foreign law in -- in  
24 light of some of the hypotheses that have been thrown out  
25 this morning. It just seems strange that it would have

1 ignored foreign law and foreign courts if it thought they  
2 were included.

3 MS. MILLETT: I don't think it's strange at all,  
4 Justice Souter, and that is because that the business  
5 exception, if I can call it that, is a carve-out. What  
6 you have here, in this Court's word, is a sweeping  
7 prophylaxis against the misuse of firearms. That's what  
8 this Court called it in Lewis, a sweeping prophylaxis.  
9 And what Congress did was back out --

10 JUSTICE SOUTER: Well, it called it that, but it  
11 didn't -- it didn't have this issue in front of it.

12 MS. MILLETT: That's -- that's right.

13 JUSTICE SOUTER: I -- I realize you've got the  
14 language, but it -- it wasn't addressing this issue.

15 MS. MILLETT: Right, and -- and the language  
16 should be what counts most. But beyond that, you're  
17 talking about Congress --

18 JUSTICE SOUTER: Well, I was talking about our  
19 language.

20 MS. MILLETT: Right. You --

21 JUSTICE SOUTER: But -- and I think that ought  
22 to count for a lot too.

23 (Laughter.)

24 JUSTICE SCALIA: Well, not too much.

25 MS. MILLETT: But what Congress was doing there

1 was backing out. It was making an exception, and it was  
2 doing this against a backdrop of a lot of violence with  
3 guns. And so it makes sense that Congress would proceed  
4 carefully and deal with matters with which it was familiar  
5 and not want to carve out things that it wasn't familiar  
6 with.

7 JUSTICE SOUTER: No, but how -- how familiar an  
8 example is it that price-fixers would -- would be placed  
9 in -- in a terrible position if they couldn't carry guns?  
10 I mean, that was not a pressing problem, so far as I know.  
11 And yet, Congress dealt with it.

12 MS. MILLETT: Well, the problem --

13 JUSTICE SOUTER: And if it can deal with a  
14 problem that is as little pressing as that, it seems odd  
15 that it would not have averted in any way to equally non-  
16 pressing problems under -- under foreign convictions if  
17 that's what they had in mind.

18 MS. MILLETT: It dealt with that. I mean,  
19 specifically at the legislative history level, it dealt --  
20 it enacted that statutory exception because some States  
21 had made these types of business crimes punishable on more  
22 than a year. So that's what it was responding to.

23 JUSTICE SOUTER: All right. What -- what --

24 MS. MILLETT: I can't -- I --

25 JUSTICE SOUTER: No. I -- finish your answer.

1 MS. MILLETT: I can't -- I'm not going to stand  
2 here and tell you that Congress specifically thought about  
3 this.

4 JUSTICE SOUTER: Oh, there's no --

5 MS. MILLETT: Right, but --

6 JUSTICE SOUTER: We both know there's no --

7 MS. MILLETT: But -- but what Congress did here  
8 -- and it's very important to understand -- it was  
9 throwing a broad net --

10 JUSTICE GINSBURG: Ms. Millett.

11 JUSTICE SOUTER: All right.

12 JUSTICE GINSBURG: Ms. Millett, there are many  
13 lawyers in Congress and at least the law students of my  
14 generation -- some of them are of that elder age. We  
15 learned in law school one country doesn't enforce the  
16 penal judgments of another. This is a kind of enforcement  
17 of a penal judgment of another, not exactly, but something  
18 like it. Another reason why I would expect a Congress,  
19 knowing that background norm, would say, when it meant  
20 foreign, foreign. Unlike the context of the immigration,  
21 yes, there are some people who left and came back, but  
22 many -- and -- and we have all this whole line of cases.  
23 Is adultery a crime of moral turpitude, and you know,  
24 those go back to the '20's.

25 But this, which came about only because of the

1 merger of two statutes, one saying Federal and State, the  
2 other not, and no explanation at all, in light of all  
3 these anomalies that have been brought out. Shouldn't we  
4 say to Congress maybe that's what you meant, but if you  
5 did, you have an opportunity to say so before we read in  
6 foreign?

7 MS. MILLETT: Two answers, Justice Ginsburg.  
8 First, this was the second time in 1986 that Congress  
9 refused to include that limitation on courts. The prior  
10 law, before the 1968 act, specifically referred to courts  
11 of the United States, States, and territories. It did not  
12 pick up that language in title IV in 1968, and they took  
13 it out --

14 JUSTICE SOUTER: But neither did it give any  
15 explanation for not carrying it forward.

16 MS. MILLETT: No, but I don't -- that --

17 JUSTICE SOUTER: It's -- it's the silence at the  
18 -- at the time it -- it apparently departed from the  
19 practice of predecessor statutes that -- that seems to be  
20 a problem for your argument.

21 MS. MILLETT: But -- but again, I don't think  
22 this Court has ever characterized as silence Congress'  
23 twice deletion of language from a statute in 1968 and  
24 again in 1986. It had it. It looked at it. It took it  
25 out. And in 1986 in the Senate report that you were



1 referring to, Justice Ginsburg, earlier, Congress said  
2 they -- the conference report said we are rejecting the  
3 Senate's definition of felony.

4           The other thing to keep in mind is when Congress  
5 enacted this statute in 1968, it also enacted an  
6 administrative mechanism for relief that would deal with  
7 exactly the uncomfortable situations that have been  
8 identified. 925(c) allows an administrative waiver in  
9 cases where an individual comes and says I don't want  
10 to --

11           JUSTICE STEVENS: You know, this is a very  
12 interesting case because there are three ways to answer  
13 the question of what is a court. You can leave it up to  
14 us to do it, and that would be judicial legislation to  
15 fill in a hole in the statute. You can have the executive  
16 do it, decide what case -- what cases to prosecute, or if  
17 we should knock out this -- interpret the statute in the  
18 -- in a different way than you urge, Congress would then  
19 do it. Now, which of the three is the better lawmaker on  
20 deciding which is the -- what should the meaning of the  
21 word court be? The executive, the legislature, or the  
22 judiciary?

23           MS. MILLETT: I think -- it's, of course, the  
24 legislature and the President's signature. I'd like to  
25 put a plug in for the executive in -- in that reference,

1 but --

2 JUSTICE KENNEDY: That would save us a lot of  
3 work. We --

4 (Laughter.)

5 JUSTICE KENNEDY: -- we could just invalidate  
6 all statutes that we don't understand.

7 (Laughter.)

8 MS. MILLETT: But, Justice Kennedy and Justice  
9 Stevens, the important thing to keep in mind here is we  
10 don't just have a statute that appeared out of nowhere.  
11 It's been on the books for a long time and there was a  
12 legislative --

13 JUSTICE STEVENS: No, but it is pretty clear  
14 that Congress didn't really think about this problem.

15 MS. MILLETT: No, but it thought -- it --

16 JUSTICE STEVENS: And it was also clear on your  
17 side that they would like to prevent this guy from having  
18 a gun.

19 MS. MILLETT: Exactly, and --

20 JUSTICE STEVENS: So there are two competing  
21 considerations, both of which are very powerful.

22 MS. MILLETT: Well, if nothing else -- and this  
23 guy is squarely within what Congress wanted to capture.  
24 If nothing else, you don't have to decide anything more in  
25 this case than that it covers persons like this whose

1 convictions are fundamentally fair and it's not contested  
2 and could leave for another day -- but let's --

3 JUSTICE BREYER: Can I -- I want to get you.  
4 Now, I have a new question.

5 JUSTICE SCALIA: Would -- would you finish --  
6 would you finish please --

7 JUSTICE BREYER: Well, I have a new --

8 JUSTICE SCALIA: -- telling us about the  
9 administrative waiver proceeding? You were in the middle  
10 of it and I never heard the --

11 JUSTICE BREYER: That's exactly what I wanted to  
12 know.

13 MS. MILLETT: Right.

14 JUSTICE BREYER: And I -- can I -- that's  
15 exactly what I wanted to know. When a person comes in to  
16 get a gun -- because I hadn't focused on this, and it  
17 actually to me it's relevant. Suppose one of these people  
18 has been convicted in a foreign court and he doesn't have  
19 a clue, you know, that this means he can't buy a gun over  
20 here. So he comes over here. He goes into a -- a gun  
21 store. Now, does he get notice that that -- this  
22 conviction over in Japan or Lithuania or wherever it was  
23 means that he can't buy the gun?

24 MS. MILLETT: Well, he got -- in this case, he  
25 got -- and this is --

1 JUSTICE BREYER: No. I'm asking -- I'm asking  
2 in general.

3 MS. MILLETT: You -- you go and you fill out a  
4 form that says, as this case did -- and it's on page 4 of  
5 our brief --

6 JUSTICE BREYER: Yes.

7 MS. MILLETT: -- asked him, have you been  
8 convicted in any court of --

9 JUSTICE BREYER: So it just says any court.

10 MS. MILLETT: In any court. And I think when  
11 someone --

12 JUSTICE BREYER: Well --

13 MS. MILLETT: No. But when someone has a  
14 conviction, when you have a felony conviction, you're on  
15 some notice of inquiry.

16 JUSTICE BREYER: It'll work for -- yes. It'll  
17 -- it'll work for this one, but -- but what I'm worried  
18 about -- and really what led the Sentencing Commission to  
19 exclude all this stuff even though clearly recidivists  
20 should get a higher sentence, but we still excluded it  
21 because it's just a nightmare. There are notice problems.  
22 There are fairness problems. There are procedural  
23 problems. There are problems of crimes that aren't crimes  
24 here.

25 MS. MILLETT: Justice --

1 JUSTICE BREYER: And -- and all those come up,  
2 and that's what I'm worried about. So I see this as a  
3 possible out.

4 MS. MILLETT: Well --

5 JUSTICE BREYER: The one -- the procedure you  
6 just talked about might help.

7 MS. MILLETT: And it's in 925(c), which is on --

8 JUSTICE BREYER: That he knows about it.

9 MS. MILLETT: -- page 65a of our brief. But let  
10 me -- let me be --

11 JUSTICE SCALIA: And it provides judicial review  
12 of the Attorney General's failure to give the waiver.

13 MS. MILLETT: It does, and -- but let me be  
14 candid up front. Congress stopped funding this  
15 administrative mechanism in 1992, and that -- this Court  
16 addressed that in the Bean case. It -- it doesn't exist  
17 now, but that was 25 years after Congress wrote this  
18 language and put it in the statute, and the fact that they  
19 stopped funding it 25 years later doesn't mean the statute  
20 doesn't mean what it said.

21 JUSTICE GINSBURG: Do you know why?

22 MS. MILLETT: And Congress --

23 JUSTICE GINSBURG: Do you know why they stopped  
24 funding it? Why did -- because I think that's been  
25 reenacted every year. No money for this. Why -- why did

1 Congress stop funding it?

2 MS. MILLETT: Because some of -- some of the  
3 people who were getting waivers were going out and  
4 committing crimes again. Congress here is very concerned  
5 about public safety.

6 And this is not -- there was, you know, the  
7 question, is there ever an element where you treat this  
8 like an element of foreign crime. There aren't -- there  
9 aren't crimes normally where you treat indictments or  
10 someone being under a restraining order this way. This is  
11 not punishing you for your foreign crime. This is a  
12 global categorical, class-wide judgment that as a class  
13 persons who have committed crimes overseas are more  
14 dangerous and may pose exactly the public safety risk we  
15 wanted to grab and stop. As a class, they do that. In a  
16 particular case, it may not. In a particular case, an  
17 indictment might not. Congress was speaking globally. It  
18 did so. It threw a broad net. It did so at the time it  
19 had an administrative check to deal with these problems.  
20 Yes, that's gone. That doesn't retroactively change what  
21 the statutory language meant.

22 This Court has said time and time again that  
23 this statutory language in 922 was written, in Beecham and  
24 Huddleston, with such care that Congress was focused on  
25 the difference between the present perfect and the past

1     tense, this Court said in Barrett. This is not sloppy  
2     writing. When Congress put any court in and did not carry  
3     forward a limitation to the courts of the United States  
4     and took that out in another part of the statute in 1986,  
5     we have to assume that Congress knew what it was doing.

6             If there were problems here, there is a  
7     political process to deal with it. The political process  
8     has taken away the administrative waiver. But there has  
9     not been -- this hypothesis of bad applications has not  
10    arisen. It's hypothesized. And what this statute has --  
11    has been used to do is capture exactly the people Congress  
12    wanted to capture. It got exactly the ones who should be  
13    disarmed.

14            JUSTICE KENNEDY: Do you know anybody in the  
15    Justice Department you might talk to to amend this form so  
16    that the form says this includes convictions in foreign  
17    countries?

18            MS. MILLETT: I -- I am confident that the ATF  
19    would be happy to do that. As of now, the ATF has a  
20    regulation on the books for someone to look at and see  
21    that includes foreign convictions in this definition. And  
22    I think when someone has been convicted, they're on  
23    notice.

24            Thank you, Justice Stevens.

25            JUSTICE STEVENS: Thank you.

1                   The case is submitted.  
2                   (Whereupon, at 11:01 a.m., the case in the  
3   above-entitled matter was submitted.)  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25